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No. 08-23

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IN THE

Supreme Court of the United States

PAUL M. MATHESON,

Petitioner,

v.

CHRISTINE GREGOIRE, Governor of the State of Washington; CINDI YATES, Director, GARY O'NEIL, Assistant Director, Washington State Department of Revenue; THE WASHINGTON STATE DEPARTMENT OF REVENUE; M. CARTER MITCHELL, Tobacco Tax Control Enforcement Program Manager, Washington State Liquor Control Board; THE WASHINGTON STATE LIQUOR CONTROL BOARD; THE STATE OF WASHINGTON; CHAD R. WRIGHT, Cigarette Tax Director, Puyallup Tribe of Indians; and THE PUYALLUP TRIBE OF INDIANS, a Federally Recognized Indian Tribe,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of Washington Division II

BRIEF FOR THE TRIBAL RESPONDENTS IN OPPOSITION

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STATEMENT OF THE CASE

The State of Washington and the Puyallup Indian Tribe in 2005 resolved a longstanding dispute by

entering into an agreement for the collection of cigarette excise taxes. Pet. App. A-51 - A-79. They followed the guidance offered by this Court in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 515 (1991), and other cases that, "States may also enter into agreements with the tribes to adopt a mutually satisfactory regime for the collection of this sort of tax."

Petitioner sells cigarettes at retail under a license from the Tribe. He filed this case to challenge the agreement. Pet. at 2. The trial court dismissed the Tribal defendants based on the Tribe's sovereign immunity from suit, then dismissed the State defendants and the case under Rule 19 of the Federal Rules of Civil Procedure because of the absence of the Tribe, a necessary and indispensable party. Pet. App. A-2.

The Washington Court of Appeals examined the grounds for dismissal in careful detail and affirmed. *Matheson v. Gregoire*, 161 P.3d 486 (Wash. Ct. App. 2007). The Washington Supreme Court denied review. 180 P.3d 1292 (Wash. 2008). None of the courts reached the merits of any of Petitioner's issues or claims.

REASONS FOR DENYING THE WRIT

I. The Questions Presented by Petitioner Were Not Decided by the Courts Below and Therefore Do Not Merit Review by This Court.

The Questions Presented in the Petition concern issues underlying the allegations made in the complaint. Pet. at i. The courts below, however,

dismissed the case without reaching those two issues or indeed the merits of any claims.

This Court consistently indicates that, "Where issues [were not] considered by the Court of Appeals, this Court will not ordinarily consider them." *Meyer v. Holley*, 537 U.S. 280, 291-92 (2003) (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970), paraphrase included); *accord Penn. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212-213 (1998).

The Petition therefore does not merit review by this Court.

II. The Questions Decided Below Do Not Merit Review.

The holdings below do not merit review by this Court. They are consistent with the long-established sovereign immunity of Indian tribes from suit absent any waiver or abrogation of that immunity. *See, e.g., United States v. U.S. Fidelity & Casualty Co.*, 309 U.S. 506, 511-513 (1940); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Puyallup Tribe v. Wash. Dep't of Game*, 433 U.S. 165, 172-173 (1977); *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 760 (1998).

Both Federal and Washington state courts hold that challenges to an agreement between two sovereigns are inappropriate under Rule 19 in the absence of one of those sovereign parties. *See, e.g., Aungst v. Roberts Constr. Co., Inc.*, 625 P.2d 167, 169 (Wash. 1981). "[A] party to a contract is necessary, and if not susceptible to joinder, indispensable to litigation seeking to decimate that contract." *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1157 (9th Cir. 2002), *cert. denied*, 537 U.S. 820 (2002).

Those threshold jurisdictional and procedural issues upon which the courts below disposed of the case therefore do not merit review.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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